

*United States Court of Appeals
for the Second Circuit*



BRIEF FOR
APPELLEE

74-2567

To be argued by
JAMES E. NESLAND

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2567

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

RAFAEL LIRA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Rafael Lira, whose true name is Rafael Mellafe, appeals from a judgment of conviction entered on November 22, 1974, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 751, filed August 3, 1973, charged defendant Mellafe, a/k/a Lira, along with sixteen other defendants, with conspiracy to violate former Sections 173 and 174 of Title 21, United States Code and Sections 812, 841(a)(1), 841(b)(1)(A), 951(a)(1) and 952 of Title 21, United States Code, by importing from various South American countries into and distributing within the United States in excess of 225 kilograms of cocaine.

The trial * commenced on October 15, 1974 and concluded on October 24, 1974, the jury finding defendant Mellafe guilty. On November 22, 1974, Mellafe was sentenced to a term of imprisonment of five years, to be followed by a special parole term of three years.

Mellafe is serving his sentence.

Statement of Facts

The Government's Case **

1. Nature of the Conspiracy

Mellafe, together with his 16 named co-defendants, were engaged in a far-flung international conspiracy which, for over a year and a half in 1970 and 1971, imported into New York City quantities of raw, uncut cocaine, ranging from a minimum of ten to a maximum of fifty kilograms per trip, from Ecuador, Peru, Chile and Europe.

The evidence at trial established that defendant Enrique Barrera, a New York City resident, was the principal figure in the conspiratorial organization.*** He recruited the suppliers and the couriers to smuggle the cocaine into New

* Mellafe went to trial alone. Five defendants had pleaded guilty before trial. Two other defendants, Enrique Barrera and Gilbert Bornsztezn, escaped from the West Street House of Detention while awaiting trial. The other named defendants were fugitives.

** The principal witnesses at trial for the Government were defendants Jorge Baro, Jamie Mendoza, Jorge Saravia and Jose Kenneth Penaranda.

*** The activities of Barrera's narcotics rings have previously been before this Court. *United States v. Barrera*, 486 F.2d 333 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974).

York; he also controlled the distribution of the cocaine in New York.

Central to Barrera's importation scheme were defendants Jamie Mendoza, Jorge Saravia and Jose Kenneth Penaranda, Bolivian diplomats assigned to the Bolivian consulate in New York. Recruited by Barrera as couriers, Mendoza, Saravia and Penaranda utilized their diplomatic status to carry suitcases filled with cocaine through United States Customs.* Assisting the diplomats on the trips was defendant Jorge Baro, a printer from Union City, New Jersey, who picked up the cocaine from the suppliers, packed it into carry-on suitcases, and delivered it to the couriers. The primary suppliers of cocaine to the conspiracy were appellant Mellafe, a/k/a Lira, and Christian Alvear in Santiago, Chile; Manuel Abdo Chacon and Milton Grijalva, in Guayaguil, Ecuador; Pepe Alhambra, in Lima, Peru; and Gilbert Bornsztezn, in Paris France.

2. Santiago, Chile.

Mellafe's entry into the conspiracy came some months after the importing operation was in full swing. In late 1970 Baro was introduced by Barrera to defendant Alberto Lopez, a New Jersey resident, at Baro's New Jersey print shop. Baro was informed that Lopez was being sent by Barrera to Santiago, Chile to arrange a source of supply there for cocaine. (Tr. 119-20). Thereafter, in April 1971 Barrera gave Baro the telephone number of Lopez in Santiago, Chile and instructed Baro to have the diplomats make the next trip for cocaine to Santiago, Chile. (Tr. 122).**

* Foreign diplomats are accorded the privilege of passing through United States Customs without a search of their person or luggage.

** References to the trial transcript will be designated "Tr.>"; references to the pretrial hearing of October 8, 1974 will be designated "H.".

Baro, accompanied by Saravia and Penaranda, flew to Santiago, Chile on April 10, 1971. (GX 20 and 22). Immediately upon arrival, Baro met with Lopez at the Sheraton Hotel and was given the first names of the suppliers, Rafael and Christian, and an address in Santiago where he was to pick up 15 kilograms of cocaine. The next day Baro and Saravia went to that address. An hour or more later appellant Rafael Mellafe and defendant Christian Alvear arrived carrying a suitcase containing 15 kilograms of cocaine. The cocaine was transferred into two carry-on suitcases, and Baro and Saravia left with the suitcases for the airport, where they rejoined Penaranda. The three returned together to New York, and Saravia and Penaranda each carried one of the cocaine-laden suitcases through Customs. Baro then delivered them to Barrera. (Tr. 123-30, 364-70).

Shortly after the trip, Saravia and Penaranda returned to Santiago. There they met with Lopez, who requested them to leave the hotel and pick up the cocaine from the suppliers. Both refused. As a result, Lopez sent a young woman to the hotel with a suitcase containing 15 kilograms of cocaine. Saravia and Penaranda transferred the cocaine into their carry-on suitcases and immediately returned to New York. After carrying the suitcases through Customs, Saravia and Penaranda delivered them to Bare, who in turn delivered them to Barrera. (Tr. 303-07, 371-74).

The final trip to Santiago, Chile was made on August 17, 1971 by Baro and Mendoza. (GX 18). Baro again contacted Lopez and was given a new address for appellant Mellafe—2360 Luis Urives, Nunoa, Santiago, Chile—and told to pick up the cocaine there.* The next day Baro went

* Baro was arrested on July 4, 1973 at John F. Kennedy International airport in possession of 10 kilograms of cocaine. Seized from Baro upon his arrest were various business cards bearing names, foreign addresses, and telephone numbers of several of the defendants, including the name, address and three telephone numbers for appellant Mellafe. (GX 2 and 9)

to that address where he met Mellafe, Lopez and Christian Alvear. Mellafe and Christian Alvear opened a suitcase containing 15 kilograms of cocaine and Baro placed the 30 half-kilogram packages into a carry-on suitcase. Baro then left with the suitcase and delivered it to Mendoza, who carried it back to New York and through United States Customs. Safely through Customs, Baro delivered the cocaine to Barrera. (Tr. 140-46, 271-73).*

The Defense Case

Mellafe testified on his own behalf.

Mellafe testified that he was a family man.** During 1970 and 1971 he testified he had been the owner and operator of a butcher business in Santiago, Chile, since 1968. He admitted knowing Jorge Baro, Christian Alvear, Alberto Lopez and Pepe Alhambra, but he denied knowing that anyone of them was involved in the cocaine traffic. According to Mellafe, Christian Alvear was a used-car salesman; Jorge Baro was a communist friend of Christian Alvear; Alberto Lopez was a jewelry salesman; and Pepe Alhambra was a Santiago tour guide.*** (Tr. 543-51, 581-83, 587-89, 594-600).

Mellafe testified that he had never used the name Rafael Lira, although he had lived on Lira Street in Santiago

* A fifth witness, Nicodemus Olate, also testified at the trial. A convicted multi-kilogram cocaine smuggler from Santiago, Chile, Olate testified that in 1971 he, Mellafe, Christian Alvear, and others joined forces in a venture through which 30 kilograms of cocaine were flown from Santiago, destined for New York.

** Mellafe testified he simultaneously maintained two families in Santiago, Chile, one with his common law wife of 18 years and the other with his legal wife of 30 years. (Tr. 543-44).

*** Contrary to Mellafe's testimony, the Government's evidence showed that Pepe Alhambra lived in Lima, Peru, where he provided cocaine to the conspiracy, and not in Santiago, Chile.

before moving to 2360 Luis Urives in August 1971. (Tr. 536, 545).

In addition to Mellafe's testimony, the defense played before the jury video-taped depositions of three witnesses taken before trial in Santiago, Chile. The three witnesses were Marcia Mellafe, defendant's daughter, and Jose Domingo Berrios Venegas and Juan Perez Lillo, Mellafe's employees. Each testified that Mellafe was the owner of a butcher shop, where he worked daily. They also testified that to their knowledge Mellafe had never used the name Rafael Lira.

The Toscanino Hearing

On October 8, 1974, one week before Mellafe went on trial, Judge Stewart held a hearing pursuant to *United States v. Toscanino*, 500 F.2d 257 (2d Cir. 1974) concerning Mellafe's allegations that he was illegally abducted from Chile and tortured by agents of the United States Government. To prove the allegations, the defense presented the testimony of Mellafe to the effect that Special Agents Charles W. Cecil and George Frangulis of the Drug Enforcement Administration directed his torture and abduction by the Chilean police.

The Government called as its witness Special Agent Cecil who denied Mellafe's allegations.

Certain of the facts and circumstances underlying Mellafe's allegations were uncontested. Those were that on August 3, 1973, the indictment in this case was filed and arrest warrants were issued for all defendants, including Rafael Lira. On February 28, 1974 the Santiago, Chile District Office of the Drug Enforcement Administration was given notice of the charges and provided with certified copies of the indictment and the arrest warrant for Rafael Lira.

On March 7, 1974, Mellafe was arrested by Chilean police officers. The Drug Enforcement Administration identified Mellafe as Rafael Lira and requested his expulsion from Chile.

On May 2, 1974, Enrique Montero Marx, Undersecretary of Interior for the Republic of Chile, signed Decree No. 807 expelling from Chile Mellafe and five other Chilean citizens indicted in the United States.

On May 4, 1974, Mellafe, along with the other five subjects of the expulsion decree, were flown from Santiago, Chile to New York where, on May 5, 1974 they were arrested by the Drug Enforcement Administration.

(A) **Mellafe's Testimony**

Mellafe testified that on March 7, 1974 he was arrested at one of his Santiago homes by Chilean police officers, who told him he was wanted for questioning concerning Christian Alvear. He was taken from his home to a local Santiago police station at Rosita Renard where, he testified, he was blindfolded, strapped nude to a box spring, beaten and tortured with electric shocks, and interrogated about illicit trafficking in firearms. During the torture, and while blindfolded, Mellafe testified that several persons came in and out. On one occasion he testified he heard English spoken, but he testified that he did not know and he was never told at any time who the English-speaking people were or whether they were Americans.* (H. 29-35, 39, 42, 64-68).

* Contrary to his testimony, Mellafe swore in his affidavit accompanying his motion that Lieutenant Gandolfi, a Chilean police officer, told him that the English-speaking people at the police station on that occasion were Special Agents Cecil and Frangulis of the Drug Enforcement Administration. At the hearing Mellafe testified on cross-examination that he never asked or discussed with Lieutenant Gandolfi who the English-speaking people were and learned the names of the two Agents from Jorge Dabed, one of the Chileans expelled with Mellafe. (H. 64-68)

After being held four days at the Rosita Renard police station, Mellafe testified he was taken to the office of the Naval Prosecutor and then to the Naval prison in Valparaiso. There he was held for approximately three weeks. While there, Mellafe testified he was constantly beaten and tortured. (H. 37-41).

Mellafe testified that he was finally returned to the Naval Prosecutor's office and informed by the Naval Prosecutor that the United States had requested his expulsion under the name Rafael Lira. He was fingerprinted and photographed. Mellafe testified that, when photographed, the photographer told him that the photograph was being taken for the Americans. (H. 42).

Mellafe testified that he was taken from the Naval Prosecutor's office to a political prison in Valparaiso. There he was detained until May 3, 1974. (H. 43-44). On May 3, he was again taken before the Naval Prosecutor, where he was told to sign his expulsion decree. Mellafe testified he saw two Americans, identified to him by Jorge Dabed as Special Agents Cecil and Frangulis, in the hallway. He testified he saw them again when he was being placed in a police van to be taken from the Naval Prosecutor's office to Santiago.* (H. 43-45).

On May 4, 1974, Mellafe testified he was taken by the Chilean authorities to Pudahuel Airport in Santiago and placed aboard an airplane. Before boarding the airplane, Mellafe testified he was examined by an American physician and given some pills. Mellafe testified Special Agents Cecil and Frangulis were on the airplane, along with eight Chilean police. All but Agent Frangulis made the flight to New York. (H. 46-49).

* Contrary to his testimony, Mellafe swore in his affidavit that he was required to sign the expulsion decree at the Naval Prosecutor's office in the presence of Special Agents Cecil and Frangulis.

(B) Special Agent Cecil's Testimony

Special Agent Cecil testified that he and Agent Frangulis represent the Drug Enforcement Administration in Chile. He testified he met Mellafe for the first time when the Chilean police placed him aboard the airplane on May 4, 1974. Agent Cecil denied having seen Mellafe before at the Naval Prosecutor's office in Valparaiso, at the Rosita Renard police station in Santiago, or anywhere else. He also denied that either he or Agent Frangulis received reports concerning Mellafe from the Chilean police after the police notified his office of Mellafe's arrest, or that they were involved in any way with the Chilean police.* (H. 90-102).

Agent Cecil testified that he accompanied Mellafe on the flight from Santiago to New York, along w/ six Chilean police officers, six agents of the Drug Enforcement Administration and a Chilean physician provided by the Chilean authorities. (H. 91-94).

* * * * *

On October 15, 1974, Judge Stewart denied Mellafe's motion, finding *United States v. Toscanino, supra*, inapplicable to the facts and circumstances of Mellafe's expulsion. (Tr. 1-3).

* Special Agent Cecil did testify that the Chilean police kept his office aware of Mellafe's place of incarceration in anticipation of a decision regarding the Government's request for Mellafe's expulsion. (H. 101-02)

ARGUMENT

The trial court properly refused to divest itself of jurisdiction over Mellafe.

Mellafe contends that Judge Stewart erred in finding *United States v. Toscanino* inapplicable to the facts and circumstances of Mellafe's expulsion from Chile. The contention lacks merit.

Judge Stewart's decision refusing to grant the relief contemplated by the *Toscanino* opinion, on the facts made out below, finds full support in this Court's subsequent opinion in *United States ex rel. Lujan v. Gengler*, Dkt. No. 74-2084 (2d Cir., January 8, 1975). The facts assumed in *Lujan* were that the United States Government had apprehended Lujan, an Argentinian citizen, by hiring an Argentinian pilot to lure him from Argentina to Bolivia, where Lujan was taken into custody and held incommunicado by Bolivian police acting solely at the direction of the United States Government. Foregoing any attempt to remove Lujan from Bolivia legally, the Government, abetted by the free-booting Bolivian policeman, flew Lujan out of Bolivia to New York and arrested him here. Measuring Lujan's allegations against those made in *Toscanino*, Chief Judge Kaufman found lacking "that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process" and which requires a dismissal of the indictment. Slip Op. at 1204-05.

The claimed illegality here falls short even of that alleged in *Lujan*. The Government did not circumvent available legal processes to obtain jurisdiction over Mellafe. Rather, the Government requested the Chilean Government to expel Mellafe, which it did by a formal expulsion decree issued under authority of Chile's Decree Law No. 81, Article 2:

"In cases contemplated under Article 418 of the Code of Military Justice, such as at times or during a state of war, and when it so required by the high interests of the security of the State, the Government shall be able to order the expulsion or abandonment of the country by given persons, be these nationals or foreigners, by way of a decree which shall bear the signatures of the Ministers of the Interior and of the National Defense." *

Mellafe claims, however, he was illegally deprived of the right, afforded under Article 2 of Decree Law No. 81 upon expulsion, to choose a destination other than the United States. In pertinent part, Article 2 provides:

"Those who are objects of these measures of expulsion or abandonment shall be able to freely choose their place of destination."

Any relief for their claimed illegality is foreclosed to him, because at most the alleged violation was of Chilean law and occurred with the full knowledge, consent and acquiescence of the Chilean Government. *Lujan, supra*, slip op. at 1205-07; *United States v. Toscanino, supra*, 500 F.2d at 267;

* Mellafe separately contends in Point II of his brief that the United States Government improperly avoided seeking his extradition under existing treaties. The contention is completely without merit. In the first place, the treaty between Chile and the United States expressly excludes from its terms extradition of each country's own citizens (Article V). In addition, narcotics offenses are not included in the list of extraditable offenses. (Article II), moreover, even were extradition under the treaty possible, there is nothing obligating the Government to invoke that legal procedure in preference to or in lieu of the expulsion procedure which was utilized.

United States v. Sobell, 244 F.2d 520, 524-525 (2d Cir.), cert. denied, 355 U.S. 873 (1957).*

To obscure the obvious applicability of *Lujan* to the situation here presented, Mellafe claims that the United States Government was responsible for his interrogation under torture at the hands of the Chilean police. There is no credible evidence to support that claim.

Even accepting Mellafe's testimony below about the torture as true,** it does not sustain a claim that agents of the United States participated in torturing him during his incarceration in Chile. At best, Mellafe's testimony below sets forth one incident of the suspected presence of United States agents at one of his interrogations under torture. Mellafe testified that, while being tortured at the Rosita Renard police station in Santiago, he heard English being spoken by persons unseen. The trial judge was amply justified in not crediting that testimony, standing alone, as competent evidence establishing "shocking governmental conduct" by the United States.

* In fact, since Mellafe's alleged legal right to choose his destination upon expulsion was violated, if at all, by the Chilean Government, the propriety of the Chilean Government withholding that right under Chilean law is an "act of state" not generally a matter for review in American courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricand v. American Metal Co.*, 246 U.S. 304 (1918); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

** In denying Mellafe relief under *Toscanino*, Judge Stewart made no express finding concerning the credibility of Mellafe's testimony insofar as it conflicted with Special Agent Cecil's testimony. Necessarily implicit in the Court's ruling that Mellafe's testimony did not entitle him to relief, however, is a finding that Mellafe's testimony failed to establish that agents of the United States participated in torturing him or were responsible for his torture by the Chilean police.

Mellafe also testified that, while at the Naval Prosecutor's office in Valparaiso, Chile on May 3, 1974, he saw Special Agents Cecil and Frangulis in the corridor and outside the building. That incident, denied by Special Agent Cecil, certainly does not support a claim of their participation in his torture. The only other incident requiring mention is that underlying Mellafe's allegations that he was "drugged" for the flight to New York. The sole basis for that claim is Mellafe's testimony that the physician who examined him at Pudahuel Airport, and who later accompanied him on the flight, gave Mellafe three pills, which made him drowsy. Obviously the pills were nothing more than tranquilizers, as Mellafe characterized them in his affidavit of September 20, 1974, prescribed to calm his admittedly wrought-up condition. (H. 46, 81). Indeed, Mellafe's testimony establishes that, contrary to the allegations in *Toscanino*, he was not drugged into a state of unconsciousness to facilitate his removal to the United States. 500 F.2d at 270. Rather, Mellafe testified to an inflight medical examination he received and to a conversation he allegedly had en route in the airplane with Agent Cecil. (H. 48, 84).

In this Court, Mellafe expressly disclaims reliance on evidence of Government participation in his torture by the Chilean police.* Mellafe here claims the Government should be held vicariously responsible for the torture, because the Government requested his arrest and expulsion. Neither *Toscanino* nor *Lujan* provides authority for Mellafe's claim. In *Lujan* there were no allegations of the type of conduct found abhorrent in *Toscanino*. *Toscanino* itself turned on allegations of torture and sadism specifically known to the

* In fact, at one point in his brief, Mellafe admits to the lack of proof that representatives of the United States were present during Mellafe's alleged torture. (Brief, p. 9) Elsewhere, however, Mellafe reasserts that American agents participated in his kidnapping and torture. (Brief, pp. 10-11)

United States Attorney's Office while in progress and participated in by an agent of the Bureau of Narcotics and Dangerous Drugs. In this case there is no evidence that any official of the United States Government knew of or in any way participated in the allegedly barbarous treatment of Mellafe by the Chilean police. Absent such evidence, the Government cannot be held to have violated the due process rights of Mellafe by enlisting the aid of the Chilean government through available legal procedures to bring him to justice for his proven violation of the Federal narcotics laws.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John D. Gordan III, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

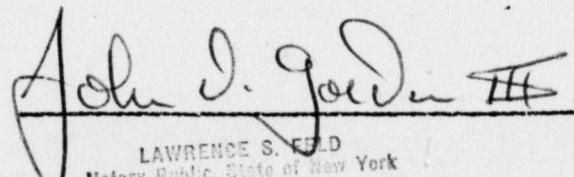
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LAWRENCE S. FELD
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